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SUPREME COURT, U.S.

CASE NO. 81-6782

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL MACK, Petitioner,

v.

THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

SUPPLEMENTAL BRIEF OF PETITIONER

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Since the Petition was filed in this case, this Court has announced its decision in United States v. Johnson, 50 U.S.L.W. 4742 (U.S. June 21, 1982). The Petitioner submits that the Johnson decision supports the grant of certiorari in this case.

In Johnson, the Court reconsidered its precedents on retroactivity of Fourth Amendment decisions and announced a new rule: "a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time of the decision." 50 U.S.L.W. at 4748. This rule was held subject to several exceptions; the Court expressly left open the question of whether the rule was applicable to decisions interpreting constitutional provisions other than the Fourth Amendment. 50 U.S.L.W. at 4748-49.

The case at bar presents the question of whether a decision of this Court interpreting the Fifth Amendment (Carter v.

Kentucky, 450 U.S. 288 (1981)) is to be applied retroactively to convictions not final at the time of the decision. The case thus offers the Court an opportunity to address and define the scope of the retroactivity principles announced in Johnson: do these principles extend beyond the Fourth Amendment?

The Petitioner would note that this Court's original formulation of retroactivity principles, as announced in Linkletter v. Walker, 381 U.S. 618 (1965) and Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966), was that both Fourth and Fifth Amendment decisions would be applied to all non-final convictions. In the Johnson decision, the Court stated that it was returning to this "original understanding." See 50 U.S.L.W. at 4743. Thus, it is submitted that precedent supports the conclusion that Fifth Amendment cases should be accorded the same retroactive effect accorded Fourth Amendment decisions in Johnson.

The Petitioner would further observe that the other reasons relied on by the Court in adopting the Johnson rule of retroactivity have equal application to Fifth Amendment cases. Specifically, the need for the courts to "do justice to each litigant on the merits of his own case", and to "treat similarly situated defendants similarly" would appear to be independent of whether the Fourth or Fifth Amendment is being interpreted. Thus, it is submitted that Johnson should control the retroactivity of decisions interpreting the Fifth Amendment as well as the Fourth Amendment.

The Petitioner submits that the Court should grant certiorari in this case, and reverse the decision of the Court of

Criminal Appeals of Oklahoma on the basis of the retroactivity principles announced in Johnson.

The Johnson decision, which had not been announced when this case was decided below, represents a significant development in the constitutional retroactivity doctrine. In the event that the Court should decide not to review this case on the merits, the Petitioner submits that the judgment below should be vacated, and the case remanded so that the Court of Criminal Appeals of Oklahoma can further consider its holding of non-retroactivity in light of the principles announced in Johnson.

Respectfully submitted,

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